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In the Supreme Court of the United States

OCTOBER TERM, 1976

WESTERN UNION TELEGRAPH COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 541 F. 2d 346. The orders of the Federal Communications Commission (Pet. App. 64a-69a; 45a-63a) are reported at 49 FCC 2d 321 and 53 FCC 2d 1045.

JURISDICTION

The court of appeals entered judgment (Pet. App. 42a-43a) on July 28, 1976. A timely petition for rehearing and suggestion of rehearing *en banc* were denied on August 18, 1976 (Pet. App. 44a). The petition for a writ of certiorari was filed on November 15, 1976. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in concluding that the Federal Communications Commission's construction of contracts between Western Union and the Bell System involved complex technological and regulatory considerations that made it inappropriate for the court to construe the contracts *de novo* on review of the Commission's order.

STATEMENT

American Telephone and Telegraph Company (AT&T) and the Western Union Telegraph Company historically have "exchanged" facilities pursuant to bilateral contracts, permitting each to use certain facilities of the other in providing service to the public (Pet. App. 70a-96a).[1] These contracts have been filed with the Federal Communications Commission ("the Comission") pursuant to statute. 47 U.S.C. 211(a). The agreements involved in this petition will expire on September 28, 1978 (Pet. App. 46a).

When these contracts were most recently renewed, in 1970, Western Union was not interconnected with AT&T for the provision of foreign exchange (FX) and common control switching arrangements (CCSA) services—two variations of private line communication service requiring the use of telephone company switching equipment (Pet. App. 57a).[2] Western Union also was not ob-

[1]Although the contracts call for "exchange" of facilities, Western Union almost always is the lessee and AT&T the lessor. See *Bell System Tariff Offerings*, 46 FCC 2d 413, 431, affirmed *sub nom. Bell Telephone Co. of Pennsylvania* v. *Federal Communications Commission*, 503 F. 2d 1250 (C.A. 3), certiorari denied, 422 U.S. 1026.

[2]For background on the dispute between AT&T and other private line common carriers over FX and CCSA interconnection—including a description of those services—see *Bell System Tariff Offerings*, *supra*. See also *MCI Communications Corp.* v. *AT&T*, 369 F. Supp. 1004 (E.D. Pa.), vacated, 496 F. 2d 214 (C.A. 3).

taining local distribution facilities from AT&T for domestic satellite services, because at that time Western Union had no satellite. *Western Union Authorization*, 38 FCC 2d 1197.

In 1974, the Commission required AT&T to furnish Western Union and similar carriers interconnection facilities, including FX and CCSA services, but barred AT&T from modifying or abrogating existing exchange agreements with Western Union by subsequently filing tariffs for interconnection facilities and services already covered by such agreements (Pet. App. 5a).[3]

In mid-1974, Western Union asked the Commission to require AT&T to charge contract rates rather than tariff rates for facilities Western Union needed to provide certain private line services and for local distribution of domestic satellite communications. Western Union relied upon the 1974 Commission order requiring AT&T to provide facilities that would enable competing carriers to offer FX and CCSA,[4] and upon the Commission's domestic satellite communications policy requiring AT&T to furnish local distribution facilities to all authorized satellite carriers.[5] It contended that all the essential facilities were already available under the existing contracts, and that it therefore was entitled to the contract rates rather than the higher tariff rates paid by other competing carriers (Pet. App. 47a-50a).

After obtaining the views of the parties, and on consideration of the language and history of the contracts as

[3]*Bell Telephone Co. of Pennsylvania* v. *Federal Communications Commission*, *supra*.

[4]*Bell System Tariff Offerings*, *supra*.

[5]*Domestic Communications-Satellite Facilities*, 35 FCC 2d 844, reconsideration denied, 38 FCC 2d 665; AT&T, 42 FCC 2d 654.

well as relevant Commission orders bearing on the services in question, the Commission denied Western Union's request (Pet. App. 45a).[6] As to the satellite facilities, the Commission found that Western Union and AT&T had waived whatever rights they might have had under the contracts when they accepted grants of satellite authorization subject to the express condition, that the grant was subject to subsequent domestic satellite policies. Eight months after Western Union received its satellite authorization subject to this condition, the Commission determined that tariffs rather than private contracts should govern such services (Pet. App. 67a-69a; 58a-63a; 9a-10a).

The Commission also determined that the contract rates are not applicable to FX and CCSA facilities. The Commission found that the contract terms themselves, read in the light of industry practice and technology at the time of their most recent renewal, did not contemplate facilities for interconnection of services that were not available at the time of contracting, and that a specific provision of the contracts made such subsequent service-to-service interconnections as FX and CCSA subject to tariff provisions rather than contract (Pet. App. 54a-57a). Accordingly, while the Commission found that Western Union was entitled to FX and CCSA interconnection, it directed that such facilities are to be leased to Western Union pursuant to tariffs filed with the Commission (Pet. App. 57a).[7]

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[6]To the extent that Western Union also asked the Commission to require AT&T to interconnect with the telegraph company to permit the provision of FX and CCSA, the Commission granted the request and declared that AT&T was required to provide such facilities (Pet. App. 65a, 69a).

[7]This construction was buttressed by affidavits submitted by AT&T and Western Union indicating that neither party contemplated at the time of contracting that FX and CCSA facilities were covered

The court of appeals affirmed (Pet. App. 1a-21a).[8] Applying the standard of review set forth in the relevant provisions of the Administrative Procedure Act, the court was unable to find that the Commission's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). It declined to undertake a *de novo* interpretation of the agreements as they affected FX and CCSA services, because it found, that the controversy fell within the ambit of the Commission's expertise, that the agreements involved complex and sophisticated communications technology, and that the decision implicated questions of national regulatory policy (Pet. App. 11a-12a). The court applied the same standard to the agency's ruling on satellite facilities (Pet. App. 17a-20a). The court noted that determining the scope of any waiver of contract rights by Western Union when it accepted a satellite authorization required both an interpretation of the Commission's own prior action in imposing conditions on such authorizations and a factual determination whether Western Union had knowingly and voluntarily accepted it (Pet. App. 17a-18a). The court accorded "the full deference of the statutory standard" to the Commission's resolution of these questions (Pet. App. 18a).

(Pet. App. 57a, n. 12). It is also consistent with the Commission's policy of nondiscriminatory rates for facilities furnished to competing carriers and its practice of requiring that tariffs rather than contracts govern such matters (Pet. App. 66a).

[8]Judge Garth dissented (Pet. App. 21a-41a). Chief Judge Seitz joined in the majority opinion written by Judge Aldisert, but he added in a separate statement that, "even assuming that the dissenting opinion has stated the applicable scope of review, he would still deny the petition for review" (Pet. App. 21a).

Although the court of appeals rejected the argument that *de novo* review was required, it nevertheless analyzed the Commission opinions thoroughly and found them not only to be reasonable, but also to be "otherwise * * * in accordance with law" (Pet. App. 17a, 20a).

ARGUMENT

Petitioner asserts that the court of appeals' failure to undertake *de novo* review of the Commission's decision construing the agreements between Western Union and Bell is inconsistent with this Court's decision in *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263.

That case, however, does not hold that a court of appeals, in reviewing a decision of an administrative agency, is required to review *de novo* every contract interpretation question that the agency may have resolved in arriving at its own decision. The scope of review depends on whether the agency's construction "reflects the application of its expert knowledge and judgment to a highly technical field" (*id.* at 268) or whether the construction question is "one to be determined simply by the application of ordinary rules of contract construction" (*id.* at 268-269). The Court in *Texas Gas Transmission* determined that the latter criterion applied to that case, because "the record nowhere discloses that the Commission arrived at its interpretation of the 'favored nation' clause on the basis of specialized knowledge gained from experience in the regulation of the natural gas business, or upon the basis of any trade practice concerning 'favored nation' clauses. On the contrary the opinions of the examiner and the Commission show that both treated the question as one to be determined simply by the application of ordinary rules of contract construction." *Ibid.* Thus, the opinion recognizes that *de novo* review would not be

appropriate where specialized knowledge of the industry is necessary or desirable in resolving particular contract interpretation questions. To preserve Congress' allocation of administrative and judicial responsibilities, reviewing courts should accord considerable deference to the judgment of expert agencies where the facts and issues in dispute are "not within the conventional experience of judges." *Far East Conference* v. *United States*, 342 U.S. 570, 574.

The court of appeals in the present case did not depart from the principles of *Texas Gas Transmission.* On the contrary, it carefully examined the Commission's decision and the record to determine whether the agency's specialized knowledge and regulatory responsibilities were implicated in its construction of the contract, or whether an ordinary question of contract interpretation was involved.[9] The only issue presented to this Court is whether the court of appeals correctly decided this question—*i.e.*, whether it correctly applied the legal standards of *Texas Gas Transmission* to the particular facts of this case. That question does not warrant review by this Court.

In any event, the court's characterization of the contract issue was correct. The question presented to the agency involved the construction of complex and technical contract terms that were meaningful only in the light of industry language, customs and practices.[10]

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[9]The court of appeals noted that any attempt to have this matter resolved in a district court "would probably have resulted in a reference to the FCC under the doctrine of primary jurisdiction" (Pet. App. 11a n. 7.). Cf. *MCI Communications Corp.* v. *AT&T*, 496 F. 2d 214 (C.A. 3). See also *Gunther* v. *San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257, 261.

[10]See *Bell Telephone Co. of Pennsylvania* v. *Federal Communications Commission, supra.*

The contracts concerned matters that otherwise would be governed by tariffs subject to close supervision by the agency; see Statement, *supra,* p. 4, note 7. The Commission's construction of those contracts therefore defined the extent to which the services involved were to be provided by generally applicable tariffs or by private agreement. Similarly, in the satellite aspect of the case, the issue turned "on an interpretation of the FCC's own prior action in imposing the contested waiver, and upon a factual determination whether WU knowingly and voluntarily accepted its authorization subject to the condition [that the grants were subject to subsequent satellite policies, which required the rates to be governed by tariffs rather than private agreement]" (Pet. App. 18a). Thus, in rejecting Western Union's argument that *de novo* review was required, the court of appeals had ample grounds to conclude (Pet. App. 11a-12a):

> Certainly, this controversy falls within the ambit of the FCC's expertise. These agreements involve complex, sophisticated, and rapidly-evolving communications technology. Quite properly WU took the matter to the FCC for resolution, not to a district court. Moreover, the agreements implicate questions of national regulatory policy. They concern the applicability of Commission-approved tariffs intended to provide access to all common carriers on reasonable and non-discriminatory terms. Under these circumstances, the fact that these are private agreements cannot alter the statutory deference due the Commission.

The court's affirmance of the Commission's reasonable construction of such contract terms thus was entirely consistent with *Texas Gas Transmission.*[11]

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[11]Petitioner argues that the Seventh and Tenth Circuits did not accord "special deference" to the Federal Power Commission's interpretation of contract provisions in *Pure Oil Co.* v. *Federal Power Commission,* 299 F. 2d 370 (C.A. 7); *Warren Petroleum Corp.* v. *Federal Power Commission,* 282 F. 2d 312 (C.A. 10); and *Skelly Oil Co.* v. *Federal Power Commission,* 532 F. 2d 177 (C.A. 10). However, none of those opinions purports to adopt a general rule which would require *de novo* review with respect to every contract interpretation question that any administrative agency may decide.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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